

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

GERALD EDISON BARNETT,
Claimant Below, Petitioner

vs.) No. 100810 (BOR Appeal No. 2043980)
(Claim No. 2006208929)

WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER,
Commissioner Below, Respondent

and

ALCAN ROLLED PRODUCTS-RAVENSWOOD, LLC,
Employer Below, Respondent

FILED
July 25, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

This appeal arises from the West Virginia Workers' Compensation Board of Review Final Order dated June 2, 2010, in which the Board affirmed a December 4, 2009, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges denied Mr. Barnett's motion for late filing of protest to the claims administrator's April 25, 2006 Order. The claims administrator's Order rejected Mr. Barnett's claim for noise-induced hearing loss. The appeal was timely filed by the petitioner, and Alcan Rolled Products-Ravenswood, LLC filed a response. The Court has carefully reviewed the records, written arguments, and appendices contained in the petition, and the case is mature for consideration.

Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, the Court is of the opinion that this case is appropriate for consideration under the Revised Rules. Having considered the parties' submissions and the relevant decision of the lower tribunal, the Court is of the opinion that the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the Court determines that there is no prejudicial error. This case does not present a new or significant question of law. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

The Board of Review affirmed the denial of Mr. Barnett's motion for late filing of

protest. Mr. Barnett argues that his attorney did not receive a copy of the claims administrator's Order rejecting Mr. Barnett's claim, which resulted in the failure to timely protest the decision. Mr. Barnett argues that when a claimant retains counsel, "counsel essentially steps into the claimant's shoes as a party to the claim." Thus, Mr. Barnett urges that any notice or order directed to a claimant must also be received by counsel before it can be considered "received." Further, Mr. Barnett cites to West Virginia Code § 23-5-13, which states that the policy of workers' compensation law is ". . . to prohibit the denial of just claims of injured or deceased workers or their dependents on technicalities."

The Office of Judges looked to West Virginia Code § 23-5-1(b), which requires that a decision of the Commission, private insurance carrier, or self-insured employer be sent to the "employer, employee, claimant, as the case may be." (Dec. 4, 2009 Office of Judges Order, p. 2.) There is no mandate that a copy of the decision be forwarded to counsel of record. *Id.* Also, this Code section provides that time limitations for protest "is a condition of the right to litigate the finding or action and hence jurisdictional." W. Va. Code § 23-5-1(b).

Nonetheless, West Virginia Code § 23-5-6 allows for the appeal or protest time period to be extended or excused "upon application of either party within a period of time equal to the applicable period by requesting an extension of the time period showing good cause or excusable neglect, accompanied by the objection or appeal petition. In exercising discretion the administrative law judge, appeal board or court, as the case may be, shall consider whether the applicant was represented by counsel and whether timely and proper notice was actually received by the applicant or the applicant's representative." In this instance, the motion for late filing of protest was filed approximately 18 months after the entry of the claims administrator's order – well outside the time allowed to protest set forth under this statute. (Dec. 4, 2009 Office of Judges Order, p. 2.) Further, there has been no showing that Mr. Barnett did not receive the claims administrator's order. *Id.* For these reasons, the Office of Judges denied Mr. Barnett's motion. The Board of Review reached the same reasoned conclusion in affirming the Office of Judges in its decision of June 2, 2010.

For the foregoing reasons, we find that the decision of the Board of Review is not in clear violation of constitutional or statutory provision, clearly the result of erroneous conclusions of law, or based upon the Board's material misstatement or mischaracterization of particular components of the evidentiary record. Therefore, the denial of the petitioner's motion for late filing of protest is affirmed.

Affirmed.

ISSUED: July 25, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman

Justice Robin Jean Davis

Justice Thomas E. McHugh

DISSENTING:

Justice Brent D. Benjamin

Justice Menis E. Ketchum